

Nos. 21A244, 21A247

**In the Supreme Court of the United States**

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*NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.*  
*Applicants*

*v.*

*OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.*  
*Respondents*

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*OHIO, ET AL.*

*Applicants*

*v.*

*DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION, ET AL.*  
*Respondents*

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ON APPLICATION FOR STAY OF ADMINISTRATIVE ACTION AND PETITION  
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**JOINT UNOPPOSED MOTION FOR DIVIDED ARGUMENT**

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Steven P. Lehotsky\*

*\*Counsel of Record*

Scott A. Keller

Michael B. Schon

LEHOTSKY KELLER LLP

200 Massachusetts Ave. NW

Washington, DC 20001

(512) 693-8350

steve@lehotskykeller.com

*Counsel for Applicants in No. 21A244*

---

Dave Yost

Attorney General of Ohio

Benjamin M. Flowers\*

*\* Counsel of Record*

Solicitor General

May Davis

John Rockenbach

Deputy Solicitors General

30 E. Broad St., 17th Floor

Columbus, OH 43215

(614) 466-8980

bflowers@OhioAGO.gov

*Counsel for Applicants in No. 21A247*

*Additional counsel listed in the signature block*

Pursuant to Rules 21 and 28.4, the applicants in case 21A244 (“the Business Association Applicants”) and the applicants in case 21A247 (“the State Applicants”) jointly move for divided argument. The applicants request to evenly divide their 30 minutes of argument time, with each group receiving 15 minutes. Through their counsel, the respondents have declined to take any position on this motion.

1. The two groups of applicants have been represented by different counsel throughout this litigation. They filed separately in the courts of appeals and they separately sought relief from this Court.

2. Although generally aligned, the Business Association Applicants and the State Applicants have distinct interests in this case. The Business Association Applicants seek a stay to prevent irreparable injury to the businesses of their respective members, which are collectively responsible for trillions of dollars of economic activity in the country. The State Applicants, in contrast, seek relief to: prevent the federal government from regulating matters over which the State Applicants alone have constitutional authority; defend their own laws and policies against a federal regulation with preemptive force; and protect their citizens from being subjected to an illegal regulation. Further, under the challenged rule, States “that administer their own state OSHA Plans” will be made to “enforce the vaccinate-or-test mandate against any covered public employees and private businesses in their jurisdiction” if a stay is not granted. *In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, No. 21-7000, et al. 2021 WL 5914024, at \*4 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting from the denial of initial hearing *en*

*banc*). These States have an interest in obtaining a court order that spares them from having to enforce an illegal administrative order.

3. The Business Association and State Applicants have advanced different arguments. For example, the Business Association Applicants argued in their stay application that the challenged emergency temporary standard is not “necessary,” and thus violates the authorizing statute, 29 U.S.C. §655(c), because it was not necessary for OSHA to promulgate an immediately effective standard without using ordinary notice-and-comment rulemaking. *See* Business Association Applicants’ Stay Motion at 15. The State Applicants did not raise that argument in the stay application filed with this Court. The State applicants did, however, argue in their stay application: that the risk presented by COVID-19 is not “grave,” §655(c); that the challenged rule is not a “temporary” response to an “emergency,” *id.*; that the “federalism canon” forbade reading the authorizing statute as empowering OSHA to issue the challenged regulation; and that reading the authorizing statute as permitting OSHA to issue the challenged regulation would cause the statute to violate the Commerce Clause. States’ Stay Application at 14–19, 23–25, 27–28, , 28–30. The Business Association Applicants did not raise these arguments in their stay application.

4. In sum, the two groups of applicants have been consistently represented by different attorneys, have distinct interests, and have made different arguments. In light of all that, and because this case is being argued in just over two weeks, it would be exceptionally difficult for counsel for one group to fully grasp and fairly represent the interests of the other.

5. This Court often allows private and government entities to divide argument. See, e.g., *United States v. Texas*, 142 S. Ct. 416 (2021); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018). Allowing the Business Association and State Applicants to argue in this case would enable the Court to hear from two groups with distinct insights on a matter of exceptional importance to business, States, public health, and our federalist structure.

6. For all the reasons discussed above, the Business Association and State Applicants believe that allowing both groups of applicants to participate in oral argument would materially aid in the resolution of this case. Therefore, they jointly move to divide evenly their 30 minutes of argument time.

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STEVEN P. LEHOTSKY\*  
\**Counsel of Record*  
SCOTT A. KELLER  
MICHAEL B. SCHON  
LEHOTSKY KELLER LLP  
200 Massachusetts Ave. NW  
Washington, DC 20001  
(512) 693-8350  
steve@lehotskykeller.com

Katherine C. Yarger  
LEHOTSKY KELLER LLP  
1550 Dayton St. Unit 362  
Denver, CO 80010

Joshua P. Morrow  
LEHOTSKY KELLER LLP  
919 Congress Ave.  
Austin, TX 78701

*Counsel for Applicants in No. 21A244*

DANIEL CAMERON  
Attorney General of Kentucky

VICTOR B. MADDOX  
CHRISTOPHER L. THACKER  
ALEXANDER Y. MAGERA  
JEREMY J. SYLVESTER  
LINDSEY R. KEISER  
Office of the Attorney General  
700 Capital Avenue, Suite 118  
Frankfort, Kentucky 40601  
Phone: (502) 696-5300  
Victor.Maddox@ky.gov

*Counsel for the Commonwealth of  
Kentucky*

Respectfully submitted,

DAVE YOST  
Attorney General of Ohio

BENJAMIN M. FLOWERS\*  
\**Counsel of Record*  
Solicitor General  
MAY DAVIS  
JOHN ROCKENBACH  
Deputy Solicitors General  
30 E. Broad St., 17th Floor  
Columbus, OH 43215  
Phone: (614) 466-8980  
bflowers@OhioAGO.gov

*Counsel for the State of Ohio*

JOHN M. O'CONNOR  
Attorney General of Oklahoma

MITHUN MANSINGHANI  
Solicitor General  
313 N.E. 21st St.  
Oklahoma City, OK  
Phone: (405) 521-3921  
Mithun.Mansinghani@oag.ok.gov

*Counsel for the State of Oklahoma*

HERBERT H. SLATERY III  
Attorney General of Tennessee

CLARK L. HILDABRAND  
BRANDON J. SMITH  
Office of the Attorney General  
and Reporter  
P.O. Box. 20207  
Nashville, Tennessee 37202-0207  
Phone: (615) 532-4081  
clark.hildabrand@ag.tn.gov

*Counsel for the State of Tennessee*

PATRICK MORRISEY  
Attorney General of West Virginia

LINDSAY S. SEE  
Solicitor General  
MICHAEL WILLIAMS (*admitted in  
Michigan; practicing under supervision  
of West Virginia attorneys*)  
Office of the Attorney General  
State Capitol Complex  
Bldg. 1, Room E-26  
Charleston, West Virginia 25305  
Phone: (304) 558-2021  
Lindsay.S.See@wvago.gov

*Counsel for the State of  
West Virginia*

LAWRENCE G. WASDEN  
Attorney General of Idaho

BRIAN KANE  
Chief Deputy Attorney General  
LESLIE M. HAYES  
MEGAN A. LARRONDO  
Deputy Attorneys General  
700 W. Jefferson Street, Ste. 210  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Phone: (208) 334-2400  
brian.kane@ag.idaho.gov

*Counsel for the State of Idaho*

LYNN FITCH  
Attorney General of Mississippi

WHITNEY H. LIPSCOMB  
Deputy Attorney General  
SCOTT G. STEWART  
Solicitor General  
JUSTIN L. MATHENY  
Deputy Solicitor General  
JOHN V. COGHLAN  
Deputy Solicitor General  
Mississippi Attorney General's Office  
P.O. Box 220  
Jackson, MS 39205  
Phone: (601) 359-3680  
scott.stewart@ago.ms.gov

*Counsel for the State of Mississippi*

DEREK SCHMIDT  
Attorney General of Kansas

JEFFREY A. CHANAY  
Chief Deputy Attorney General  
SHANNON GRAMMEL  
Deputy Solicitor General  
120 SW 10th Avenue, 2nd Floor  
Topeka, Kansas 66612  
Phone: (785) 296-2215  
jeff.chanay@ag.ks.gov

*Counsel for the State of Kansas*

ERIC S. SCHMITT  
Attorney General of Missouri

D. JOHN SAUER  
Solicitor General  
Office of the Missouri  
Attorney General  
Supreme Court Building  
P.O. Box 899  
Jefferson City, MO 65102  
Phone: (573) 751-3321  
John.Sauer@ago.mo.gov

*Counsel for the State of Missouri*

STEVE MARSHALL  
Attorney General of Alabama

EDMUND G. LACOUR JR.  
Solicitor General  
THOMAS A. WILSON  
Deputy Solicitor General  
State of Alabama  
Office of the Attorney General  
501 Washington Ave.  
Montgomery, AL 36130  
Phone: (334) 242-7300  
Edmund.LaCour@AlabamaAG.gov

*Counsel for the State of Alabama*

AUSTIN KNUDSEN  
Attorney General of Montana

KRISTIN HANSEN  
Lieutenant General  
DAVID M.S. DEWHIRST  
Solicitor General  
CHRISTIAN B. CORRIGAN  
Assistant Solicitor General  
Office of the Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: (406) 444-2026  
David.Dewhirst@mt.gov

*Counsel for the State of Montana*

TREG R. TAYLOR  
Attorney General of Alaska

CHARLES E. BRASINGTON  
Assistant Attorney General  
State of Alaska  
1031 West Fourth Avenue, Suite 200  
Anchorage, AK 99501  
Phone: (907) 269-6612  
charles.brasington@alaska.gov

*Counsel for the State of Alaska*

MARK BRNOVICH  
Attorney General of Arizona

BRUNN W. ROYSDEN III  
SOLICITOR GENERAL  
DREW C. ENSIGN  
Deputy Solicitor General  
Arizona Attorney General's Office  
2005 N. Central Ave.  
Phoenix, AZ 85004  
Phone: (602) 542-3333  
Drew.ensign@azag.gov

*Counsel for the State of Arizona*

DOUGLAS J. PETERSON  
Attorney General of Nebraska

JAMES A. CAMPBELL  
Solicitor General  
Office of the Nebraska  
Attorney General  
2115 State Capitol  
Lincoln, Nebraska 68509  
Phone: (402) 471-2682  
jim.campbell@nebraska.gov

*Counsel for the State of Nebraska*

JOHN M. FORMELLA  
Attorney General of New Hampshire

ANTHONY J. GALDIERI  
Solicitor General  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301  
Phone: (603) 271-3658  
Anthony.J.Galdieri@doj.nh.gov

*Counsel for the State of New Hampshire*

WAYNE STENEHJEM  
Attorney General of North Dakota

MATTHEW A. SAGSVEEN  
Solicitor General  
Office of Attorney General  
500 North 9th Street  
Bismarck, ND 58501-4509  
Phone: (701) 328-3640  
masagsve@nd.gov

*Counsel for the State of North Dakota*



LESLIE RUTLEDGE  
Attorney General of Arkansas

NICHOLAS J. BRONNI  
Solicitor General  
VINCENT M. WAGNER  
Deputy Solicitor General  
Office of the Arkansas  
Attorney General  
323 Center Street, Suite 200  
Little Rock, Arkansas 72201  
Phone: (501) 682-8090  
Nicholas.bronni@arkansasag.gov

*Counsel for the State of Arkansas*

ALAN WILSON  
Attorney General of South Carolina

ROBERT D. COOK  
Solicitor General  
J. EMORY SMITH, JR.  
Deputy Solicitor General  
THOMAS T. HYDRICK  
Assistant Deputy Solicitor General  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Phone: (803) 734-3680  
thomashydrick@scag.gov

*Counsel for the State of South Carolina*

ASHLEY MOODY  
Attorney General of Florida

HENRY C. WHITAKER  
Solicitor General  
DANIEL W. BELL  
Chief Deputy Solicitor General  
EVAN EZRAY  
JASON H. HILBORN  
Deputy Solicitors General  
JAMES H. PERCIVAL  
Deputy Attorney General of  
Legal Policy  
NATALIE P. CHRISTMAS  
Assistant Attorney General of  
Legal Policy  
State of Florida  
Office of the Attorney General  
The Capitol, Pl-01  
Tallahassee, Florida 32399-1050  
Phone: (850) 414-3300  
Henry.Whitaker@myfloridalegal.com

*Counsel for the State of Florida*

JASON R. RAVNSBORG  
South Dakota Attorney General

DAVID M. MCVEY  
Assistant Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501-8501  
Phone: (605) 773-3215  
david.mcvey@state.sd.us

*Counsel for the State of South Dakota*

CHRISTOPHER M. CARR  
Attorney General of Georgia

STEPHEN J. PETRANY  
Solicitor General  
ROSS W. BERGETHON  
DREW F. WALDBESER  
Deputy Solicitors General  
State of Georgia  
Office of the Attorney General  
40 Capitol Square, S.W.  
Atlanta, Georgia, 30334  
Phone: (404) 458-3378

*Counsel for the State of Georgia*

THEODORE E. ROKITA  
Attorney General of Indiana

THOMAS M. FISHER  
Solicitor General  
JULIA C. PAYNE  
MELINDA R. HOLMES  
Deputy Attorneys General  
Office of the Indiana Attorney General  
IGC South, Fifth Floor  
302 W. Washington Street  
Indianapolis, IN 46204  
Phone: (317) 232-6255  
Tom.Fisher@atg.in.gov

*Counsel for the State of Indiana*

KEN PAXTON  
Attorney General of Texas

BRENT WEBSTER  
First Assistant Attorney General  
AARON F. REITZ  
Deputy Attorney General for  
Legal Strategy  
JUDD E. STONE II  
Solicitor General  
LANORA C. PETTIT  
Principal Deputy Solicitor General  
WILLIAM F. COLE  
RYAN S. BAASCH  
Assistant Solicitors General  
LEIF A. OLSON  
Special Counsel  
Office of the Attorney General  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
Phone: (512) 936-1700  
William.Cole@oag.texas.gov

*Counsel for the State of Texas*

SEAN REYES  
Attorney General

MELISSA A. HOLYOAK  
Solicitor General  
Office of the Attorney General  
350 N. State Street, Suite 230  
P.O. Box 142320  
Salt Lake City, UT 84114-2320  
Phone: (385) 271-2484  
melissaholyoak@agutah.gov

*Counsel for the State of Utah*

JEFFREY S. THOMPSON  
Solicitor General of Iowa

SAMUEL P. LANGHOLZ  
Assistant Solicitor General  
Office of the Iowa Attorney General  
1305 E. Walnut Street  
Des Moines, Iowa 50319  
Phone: (515) 281-5164  
jeffrey.thompson@ag.iowa.gov

*Counsel for the State of Iowa*

BRIDGET HILL  
Attorney General of Wyoming

RYAN SCHELHAAS  
Chief Deputy Attorney General  
Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, WY 82002  
Telephone: (307) 777-5786  
ryan.schelhaas@wyo.gov

*Counsel for the State of Wyoming*

JEFF LANDRY  
Attorney General of Louisiana

ELIZABETH B. MURRILL  
Solicitor General  
JOSEPH S. ST. JOHN  
Deputy Solicitor General  
JOSIAH KOLLMEYER  
Assistant Solicitor General  
MORGAN BRUNGARD  
Assistant Solicitor General  
Louisiana Department of Justice  
1885 N. Third Street  
Baton Rouge, LA 70804  
Phone: (225) 326-6766  
emurrill@ag.louisiana.gov

*Counsel for the State of Louisiana*